Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-361

D.I.Z. LIVESTOCK CO., a Co-Partnership, by JAMES A. BAIRD, Manager, JEFF J. ISAACKS, LAURA E. McKINLEY, H. A. WOOD,
Petitioners,

v.

THE UNITED STATES,
Defendant.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Claims

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	4
Statement of Facts	4
Reasons for Granting the Writ	10
Conclusion	18
Appendix A. (Decisions of the United States Court of Claims.)	A-1

Case Citations

Carstens Packing Company v. United States (Ct.Cl.), 62 F. Supp. 524	10
Dodge Street Building Corporation v. United States, 169 Ct.Cl. 496, 341 F.2d 641	10
Georgia Kaolin Company v. U.S., 145 Ct. Cl. 39	10
Gila River Pima-Marcicopa Indian Community v. United States, 199 Ct. Cl. 586, 467 F.2d 1351	10
Hubbard v. New York, N.H. & H.R. Co., 70 Conn. 563; 40 A. 533	17
Micrecord Corporation v. The United States, 176 Ct. Cl. 46, 361 F.2d 1000	16

Raymond Commerce Corp. v. U.S., 93 Ct. Cl. 698 10
Resort Hotel Company v. U.S., 69 Ct. Cl. 691 10
United States v. Certain Parcels of Land (U.S.D.C.—Cal.), 131 F.Supp. 65 13

Constitutional Provisions and Statutes Involved

Constitution of the United States, Article V. 4
43 U.S.C.A. Sec. 315 q. 3, 4, 8, 9, 17, 18

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The Petitioners, D.I.Z., Livestock Co., a Co-Partnership, by James A. Baird, Manager, Jeff J. Isaacks, Laura E. McKinley, and H. A. Wood pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Claims rendered in these proceedings on June 11, 1976.

OPINION BELOW

The United States Court of Claims entered a decision on June 11, 1976, dismissing the petition filed by Petitioners, as plaintiffs in the lower court, and this decision appears in Appendix A, infra, pages A-1 to A-5. This decision was rendered with opinion and is as yet unreported.

JURISDICTION

The decision of the United States Court of Claims was entered June 11, 1976. See Appendix A, p. A-1, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

Petitioners filed suit in the United States Court of Claims for damages sustained as a result of defendant's breach of contract. Petitioners and defendant United States in 1942 originally executed lease and suspension agreements whereby defendant leased petitioners' ranch premises including the patented land, the state land and the federal B.L.M. land. The leases were renewed in 1949 on substantially the same terms and conditions. These lease contracts all terminated June 30, 1970, and contained a covenant in section ten thereof that "The Government shall surrender possession of the premises upon expiration or termination of this agreement * * *."

The United States Court of Claims specifically held that "It is quite apparent that defendant's failure to return plaintiffs' property constitutes a *technical breach* of section 10 of the 'lease and suspension' agreements." But the lower court denied relief "because plaintiffs have suffered no damages." To buttress this conclusion the lower court noted that at the termination of the leases defendant condemned an additional ten year lease interest in plaintiffs' property. However, the lower court failed to recognize that this New Mexico condemnation action covered only the patented and state lease lands belonging to petitioners—no condemnation to lease or additional lease of the B.L.M. lands belonging to Petitioners has been made by defendant.

Secondly, the lower court upheld the denial by the Department of Army of any additional compensation under 43 U.S.C. Sec. 315q "on the ground that a portion of the 'lease and suspension' agreement payments was intended to serve as full compensation for cancellation of plaintiffs' grazing permits."

The Questions Thereby Arising Are:

1. Is the defendant liable in damages for breach of contract in failing to return the B.L.M. lands to petitioners since the lower court held that defendant breached the lease contracts by failing to return the ranch premises, which included B.L.M. lands? Does the defendant's course of conduct in executing the original leases in 1942 and the subsequent renewals in 1949 and later years providing for a return of the ranch premises including the B.L.M. lands raise an equitable estoppel against any contrary contention by the government?

2. Is the denial of Section 315q relief arbitrary based upon the Army's contention "that a portion of the 'lease and suspension agreement payments was intended to serve as full compensation for cancellation of plaintiffs' grazing permits," when the defendant had the contractual obligation to return the B.L.M. lands to petitioners and the government's course of conduct establishes on grounds of equitable estoppel a mutual intention that upon termination of the subject leases the entire ranch premises, including the B.L.M. lands, would be returned?

3. Is the denial of relief to petitioners violative of the constitutional guarantees against the taking of private property without just compensation, the impairment of contractual obligations and the denial of due process?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Article V:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation."

43 U.S.C.A. Sec. 315 q.:

> "Whenever use for war or national defense purposes of the public domain or other property owned by or under the control of the United States prevents its use for grazing, persons holding grazing permits or licenses and persons whose grazing permits or licenses have been or will be canceled because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war or national defense purposes. Such payments shall be deemed payment in full for such losses. Nothing contained in this section shall be construed to create any liability not now existing against the United States."

STATEMENT OF FACTS

On October 8, 1949, the petitioner Laura E. McKinley, formerly Laura E. Burris, entered into a lease and suspension agreement with the defendant United States whereby defendant leased a ranch premises containing 60,170.99 acres more or less. The aforesaid ranch premises was comprised of 80 acres of patented land, 60,422.44 acres of New Mexico State grazing lease land and the remainder of said acreage consisted of federal lands under a Department of Interior B.L.M. grazing permit.

On July 19, 1950, Will F. Isaacks and Myrtel V. Isaacks, predecessors in title of the petitioner Jeff J. Isaacks entered into a lease and suspension agreement with the defendant United States covering 6,134.49 acres of land situated in Dona Ana County, New Mexico, and consisting of 1,235.16 acres of New Mexico State lease land and 4,608.25 acres of Federal land under a Department of Interior B.L.M. grazing permit. On April 27, 1967 the defendant United States reaffirmed the aforesaid 1950 lease and recognized the petitioner Jeff J. Isaacks as the successor in title and as lessor.

On November 15, 1949, petitioner H. A. Wood entered into a lease and suspension agreement with the defendant United States covering a ranch premises consisting of 839.62 acres of patented land, 1,511.20 acres of New Mexico State lease lands and 15,992.96 acres of Federal land held under a Department of Interior of B.L.M. grazing permit.

On February 10, 1950 and on June 15, 1950, the plaintiff D.I.Z. Livestock Company, a co-partnership, entered into a lease and suspension agreement with the defendant United States covering a ranch premises consisting of 156.63 acres of patented land, 7,841.44 acres of New Mexico State lease lands and Federal land held under a Department of Interior B.L.M. grazing permit.

Some of the above referenced leases constituted renewals in substantially the same form and covering the same real estate as prior leases executed by the United States in 1942 and in prior years. All of these lands lie within the White Sands Missile Range in New Mexico. During World War II part of the land was used by the defendant United States for a bomb-

ing and gunnery range. Later the area was converted into a guided missile test range.

All of the above referenced four leases are identical in form and therefore a summary of the substantive terms thereof applies to each petitioner. Under the leases the respective petitioners are designated as the "Grantors."

Under Sec. 2 of the subject leases the respective grantors leased and delivered possession of their property which was designated as the "Premises". A specific legal description of the premises was attached to each lease by a separate sheet. The legal description of the premises contained a complete legal description by section, township and range for the real estate which was leased. This included patented land, state land and federal land under the Department of Interior or B.L.M. leases. In most instances the B.L.M. land comprised the major land area of the subject premises. During the term of the leases no distinction was made as to payment of annual rentals for the patented land, the state lease land or the B.L.M. lands.

The leases were to run from year to year and the government had the option at any time to terminate the leases at the expiration of each yearly period. It was further stipulated in section 4 of the leases that the year to year terms should in no event extend beyond June 30, 1970.

Under section 7 the respective grantors were obligated to continue payment of real estate taxes, state or federal lease fees and other overhead costs covering the state lease lands and the B.L.M. lease lands unless the payment of such fees was either canceled or forgiven by the government.

By section 9 of the leases the government stipulated that the entire transaction was without prejudice to the grantors in reinstating their grazing privileges when "the herein described lands are returned to federal grazing administration."

Section 10 of the subject leases provided in part as follows:

> "The government shall surrender possession of the premises upon expiration or termination of this agreement***".

When the government initially leased this property most of the petitioners were required to gather their livestock over vast areas of grazing lands and relinquish possession within 90 days. The Government chose to lease the property on a yearly basis retaining the option to relinquish possession back to the ranchers at the end of any annual lease period. Thus the ranchers had to be prepared to retake possession of their ranch premises at any time and acquire new livestock for restocking the grazing land. From a reading of the entire terms and conditions of the respective lease agreements, it is clear that when executed, both parties to the contracts contemplated a complete return of the ranch premises to the petitioners. It was to the advantage of the government from a financial standpoint to retain the option of returning all the premises back to the ranchers at the end of any annual lease term.

The defendant United States filed a Motion for Summary Judgment and attached twenty-seven exhibits in support thereof. These exhibits included all of the subject leases including the legal descriptions of the premises. The defendant further produced as exhibits copies of Declarations of Taking filed in the United States District Court for the District of New Mexico whereby the defendant United States acquired by condemnation action additional year to year leases covering the patented lands and the state lease lands only. The government further introduced exhibits showing payments made by the government to cover the acquisition of certain improvements on the subject premises. The payments for these improvements were made in the year 1972 but it was specifically stipulated that such payments were without prejudice to the claims of petitioners for a return of the federal B.L.M. lands. The government further in-

troduced as exhibits copies of the B.L.M. grazing permits held by some of the petitioners.

The government likewise introduced a memorandum opinion in the New Mexico lease condemnation proceedings filed in July of 1970 which showed that the New Mexico Federal District Court held as follows:

> "Any claims against the United States for breaches of the lease and suspension agreement, if any, cannot be raised in this proceedings.
>
> The motions to strike the defenses of equitable estoppel are granted."

The government introduced no other evidence showing any contrary intention by the parties to the lease agreements regarding a return of the ranch premises. In commenting upon the New Mexico condemnation proceedings the lower court noted "the government filed declarations of taking of plaintiff's private ownership and state lease hold interest in the United States District Court for the District of New Mexico." But no condemnation action or compensation was paid after the termination of the original leases in regard to the B.L.M. portion of the entire ranch premises. The lower court completely ignored the contractual obligation of the defendant United States to return the B.L.M. portion of the lease premises.

On March 30, 1973, the Department of the Army denied petitioners' claims for additional compensation under section 315 q. As stated by the lower court "the Army based its denial on the ground that a portion of the 'Lease and Suspension Agreement' payments are intended to serve as full compensation for cancellation of plaintiff's grazing permits." None of the evidence introduced by the government reflect any intention that a portion of the rental payments paid pursuant to the lease and suspension agreements constituted payments pursuant to

section 315 q. When these leases were re-negotiated in 1949 and in subsequent years, they still contained the section 10 clause which provided for a return of the entire ranch premises including the B.L.M. lands. All other terms of the lease and suspension agreements indicated a clear intention that at some future date the government would cease to lease the ranches and return the petitioners' property. Nothing in the lease and suspension agreements as negotiated gives any indication that the parties to the agreement contemplated that the B.L.M. grazing permits had been permanently canceled. When the leases were originally executed in 1942 and in prior years, section 315 q. relief did not even exist and it could not possibly have been contemplated then that a portion of the annual rental payments constituted 315 q. payments. Since the government re-negotiated the lease agreements in 1949 and in subsequent years in substantially the same form without mentioning or stipulating that the B.L.M. permits and the leases on the B.L.M. land had been permanently canceled, the government should be precluded on grounds of equitable estoppel from now claiming that a portion of the lease payments constituted compensation paid pursuant to 315 q. relief.

Equitable estoppel against any government claim that the B.L.M. leases or permits had been canceled further applies because the defendant United States assessed inheritance taxes on these B.L.M. leases as being assets of decedent's estates—the government collected such inheritance taxes from the petitioner Jeff Isaacks and other landowners in the White Sands area. From the standpoint of tax liability the defendant United States through the Internal Revenue Service has concluded as a matter of law that the petitioners and those similarly situated owned the B.L.M. lease rights for the purpose of assessing inheritance taxes.

REASONS FOR GRANTING THE WRIT

1. **The Decision Below Ignores the Contractual Obligation of the Government to Return the B.L.M. Portion of the Lease Premises; Thus Petitioners' Constitutional Rights of Due Process, Their Right to Compensation for the Taking of Property and Their Right That Contractual Obligations Shall Not Be Impaired Were All Violated; on Principles of Equitable Estoppel the Government Is Precluded From Denying Its Contractual Obligation to Return the Entire Ranch Premises, Including the B.L.M. Portion.**

The real question in the case at bar is whether or not the defendant United States Government should be held to the same moral contractual obligations as a private citizen under the same circumstances. The cases are legion that the government, as well as any private citizen lessee, must honor lease covenants including the duty to surrender back the demised premises. *Resort Hotel Company v. U.S.*, 69 Ct. Cl. 691; *Carstens Packing Company v. United States* (Ct.Cl.), 62 F. Supp. 524; *Raymond Commerce Corp. v. U.S.*, 93 Ct. Cl. 698; *Georgia Kaolin Company v. U.S.*, 145 Ct. Cl. 39; *Dodge Street Building Corporation v United States*, 169 Ct. Cl. 496, 341 F.2d 641; *Gila River Pima-Maricopa Indian Community v. United States*, 199 Ct. Cl. 586, 467 F.2d 1351.

The lease contracts which the defendant United States prepared and executed in 1949 and in subsequent years, specifically described and incorporated the B.L.M. lands as an integral part of the premises. By section 10 of the leases the defendant United States was squarely obligated to return the entire premises to the petitioners at the termination date of the leases. The lower court has held that the government breached section 10 of the lease agreements but ignored the breach as to the B.L.M. portion of the subject premises. Rights or benefits derived from

valid contracts must be considered as property rights entitled to the protection of due process and the protection of not being acquired by the government without just compensation. If damages for this breach of contract are not awarded the petitioners will suffer the impairment of a valuable contractual obligation.

Obligations of contracts are virtually as important to the citizens of this Nation as obligations imposed by law. Indeed the right of the sovereign to deal with its citizens and acquire lands by either lease or purchase must be pursuant to law. If the government by its authorized acts executes contracts which may later prove uneconomical or unwise, this cannot excuse performance of the obligations thereunder. It would not constitute any excuse for performance in favor of a private citizen. Certainly in the case at bar it would have been far wiser for the defendant United States in 1942 or in 1949 to have condemned all of the subject ranch premises in fee rather than by lease. Because of the inflation in land prices it has cost the government money to delay total acquisition of the property. But if we focus our attention back to the time the leases originated during World War II and in 1949 it is easy to understand why the government acted as it did. The government saw fit to lease the ranch premises on a yearly basis retaining the option unto itself and at its sole election to terminate the leases and force the ranchers to take the property back at the end of any annual term. If a lasting peace had been acquired subsequent to World War II or after the initial post war hostilities, and if this Nation had experienced a depressed economy as it did subsequent to World War I, then it probably would have been economically advantageous to the government to terminate the leases. This in fact was what was contemplated when the leases originated. If either in 1942 or in 1949 the government had had any inclination that the subject premises would be needed by the government permanently then permanent acquisition would have been consumated at that time.

If contractual obligations are to be honored and if this Nation is to remain a government of laws rather than a government of men, the breach of the lease contracts as to the B.L.M. lands in the case at bar must not be ignored by this Court.

It is quite true that the decisions of this Court after resolving different conclusions from lower appellate courts, have been that the United States has no obligation for payment of compensation in a condemnation action for the termination of grazing privileges on B.L.M. land. Consideration cannot even be given to a severance of B.L.M. lands from patented lands owned by a rancher in considering their conjunctive use with such deeded lands. These are harsh principles of law which have caused great hardship to ranchers in western states who under certain conditions have lost their B.L.M. grazing lands and have been left with an uneconomical ranch unit. The Justice Department has been successful in saving the government from compensating for such losses. However, such law has no application to the facts in the case at bar.

Even though in 1942 or 1949 or in subsequent years it may be true that the defendant United States could have terminated these B.L.M. permits or B.L.M. leases without any obligation to compensate the ranchers therefore, this does not eliminate their contract obligation to return the B.L.M. lands.

Perhaps through a misconstruction of the law or for other reasons the defendant United States saw fit to execute lease contracts whereby the government agreed to pay a rental for the B.L.M. lands as part of the premises covered by the subject lease agreements. Whatever the government's reasons, the fact is that these leases were signed by the government and by the ranchers involved. The preparation of the leases in this manner and their execution by both the government and the ranchers created the clear impression that it was the intention of the parties that the entire ranch premises would at some point of time in the future

be returned to the ranchers as an entire operating unit. If this had not been the clear intent and contemplation of the parties, it is fair to say that such leases would have never been negotiated or executed by the ranchers. If the ranchers had been advised or if the intention had been made clear by the lease contracts that the B.L.M. lease lands would never be returned to the ranchers this would have made a vast difference. If the ranchers had known that such a possibility existed, they would have placed no residual value to the lease contracts whatsoever. If there was no obligation to return the B.L.M. lease lands at the end of the term of the leases, the mere return of the patented land and the state lease land would be meaningless because in most instances the patented land and state lease land alone would be separated tracts not having any feasible or economic value as ranching units. In this area of the country vast acreage is necessary in order to constitute a workable ranching unit.

If the government escapes the contractual duty and obligation to return the B.L.M. lease lands to the petitioners, then there is no contractual morality on the part of the United States. Certainly we should not reduce the moral obligations of the government under contracts to the level of a used car dealer. The case at bar constitutes a situation where this Court must apply the principles of equitable estoppel as against the sovereign. Misleading conduct based upon the precepts of common honesty, clear fairness and good conscience may be applied against the sovereign if the acts of the officers or agents of the government in entering into contracts or representations were duly authorized by the government. In the case at bar we are not confronted with any unauthorized acts of officers or agents of the government—everything that was done in executing the subject lease agreements was fully authorized by the government. In considering the principle of estoppel the case of United States v. Certain Parcels of Land (U.S.D.C.—Cal.), 131 F. Supp. 65, should be noted. In the Certain Parcels of Land case the United States brought an action to condemn a leasehold on

several parcels of land located at the Los Angeles Harbor. The defendant Outer Harbor had leased the condemned land from the City of San Pedro since 1912. In 1943 and in 1944 Outer Harbor subleased this land to the Nevy Department and the government constructed warehouses on the subject tracts. Under these subleases the government retained the right to remove all improvements prior to termination. In 1949 the Navy notified Outer Harbor that the subleases would be terminated during the first half of 1950 and negotiations ensued concerning the waiver of restoration upon payment of a fixed sum. Outer Harbor agreed to reduce its demand for restoration payments to the sum of $155,000.00 provided the government transfer ownership of the existing warehouse buildings to Outer Harbor. Authority was given to accept this offer of settlement by the Department of Navy and a letter was drawn up pursuant to Navy authority which agreed to Outer Harbor's reduced offer. Navy representatives agreed that after that time the warehouse buildings belonged to Outer Harbor. Thereafter the Navy delivered possession of the lease premises including the warehouses.

Outer Harbor then spent money to alter and repair the warehouses and entered into a lease with Goodyear Rubber for a portion of the warehouses. Payment of the settlement to Outer Harbor and formal execution of the settlement agreements was later held up by the government. Then in 1951 the government changed its mind and decided that it was necessary to take back the leases and the warehouse property. This condemnation action was then filed after purchase negotiations failed. In the condemnation proceedings the government contended that Outer Harbor did not own the warehouse buildings as improvements on the leasehold.

The Court held that Outer Harbor was entitled to invoke the doctrine of equitable estoppel against the United States. The Court held tha where the conduct of government officers or agencies constitutes authorized conduct and actions or written

agreements authorized by the government, then equitable estoppel applies against the sovereign. In this connection it was stated in the body of the opinion at page 72 to 73 as follows:

> "Equitable estoppel stands for the basic precepts of common honesty, clear fairness and good conscious. (Citing numerous authorities) * * *
>
> *'The vital principal,' the Supreme Court has said, 'is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.'* Dickerson v. Colgrove, 1879, 100 U.S. 578, 580, 25 L.Ed 618.
>
> Because a man should not be permitted to gain an advantage through his own fraud, actual or constructive, Randon v. Toby, 1850, 11 How. 493, 519, 52 U.S. 493, 519, 13 L.Ed. 784, tacit encouragement by conduct has been held sufficient to raise an estoppel."

At page 74 of the opinion the court outlined the application of equitable estoppel as against the sovereign:

> "To summarize, the government is bound by the doctrine of estoppel where: (1) there has been a waiver of sovereign immunity to suit, cf. Hopkins v. Clemson Agricultural College, 1911, 221 U.S. 636, 646, 31 S.Ct. 654, 55 L. Ed 890, (2) the agent whose conduct is relied upon to work an estoppel acted within the scope of his authority lawfully conferred, and (3) application of the doctrine does not bring a result that is either inequitable or contrary to law. Cf. Smale and Robinson, Inc. v. United States, D.C.S.D. Cal. 1954, 123 F. Supp. 457, 466-467.
>
> Briefly put, then, in cases where sovereign immunity to suit has been waived, the government can be estopped by the conduct of its agents in the same circumstances as a private individual, partnership, or corporation."

This being a breach of contract action under the lease agreements, the government has clearly waived immunity and this action was properly brought as a Tucker Act Suit. Since the leases as prepared and executed by the government incorporated as part of the legal description and as part of the definition of the premises all of the B.L.M. lease land, the government must be bound thereby. No valid reason can be advanced why the governments obligation to surrender and return back the B.L.M. grazing land under its section 10 breach of the lease covenants should either be ignored or excused by this Court. Even if the Court might consider this contractual obligation to have been foolish on the part of the government in its origination, this does not excuse performance—no private individual would be relieved of contractual obligations in the same circumstances. Clearly the cardinal principle of estoppel as enunciated by this Court in the Dickerson case applies "That he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such persons to loss or injury by disappointing the expections upon which he acted." The government should be held to its contractual obligations the same as any private citizen and the breach of section 10 of the lease agreements must be recognized by this Court.

The case of *Micrecord Corporation v. The United States*, 176 Ct. Cl. 46, 361 F. 2d 1000 was cited by the lower court for the proposition that there is no appropriate remedy for the section 10 breach of the lease agreements because petitioners "suffered no damages." With all due respect to the legal ability of the lower court, there is nowhere in the four corners of the Micrecord decision any legal support for such a contention. Indeed it is an astounding fallacy of jurisprudence to contend that because a contractual right or a property right can be destroyed subsequent to the time that the government was obligated to perform a duty creating such right, this eliminates the obligation to perform, i.e—thus eliminating the government's

obligation to return the subject premises in the case at bar. A defendant cannot escape liability for destroying property by showing that "the plaintiff would have lost it in some other way." *Hubbard v. New York, N.H. & H.R. Co.*, 70 Conn. 563; 40 A. 533.

2. **The Denial of 315q Relief Was So Clearly Wrong as to Be Arbitrary on Principles of Equitable Estoppel.**

The Army based its denial of 315q relief on the grounds that a portion of the lease and suspension agreement payments was intended to serve as full compensation for cancellation of plaintiff's grazing permits. However, most of the leases originated prior to the adoption of any 315q legislation and certainly could not have been contemplated in 1942 as being compensation for total cancellation of the B.L.M. permits. After the adoption of section 315q if the government had really intended during the decade of the 1940's that the rental payments under these lease agreements constituted payment of 315q compensation, as payment in full for total cancellation of the B.L.M. permits, then the government should have stipulated such a provision in the lease contracts themselves. Why did the government in the 1949 leases and in subsequent years reaffirm the prior leases in their entirety by specifically describing the B.L.M. lands as constituting part of the lease premises which under section 10 were to be returned and surrendered back to the petitioners at the termination of the leases. One only needs to follow the sequence of events in time to see that no 315q relief has been paid whatsoever. If the defendant was obligated to return the B.L.M. lease lands back to the ranchers at the termination of the leases in 1970, then it was the contractual obligation of the government to restore the B.L.M. leases and permits at that time. If the government desired to subsequently terminate those B.L.M. leases and grazing permits, after 1970, then the question of granting 315q relief would be presented. The

Army's belated contention in 1973 that the twenty years of lease payments prior to 1970 constituted partially a payment of 315q compensation, is contrary to the clear intention of the lease agreements themselves and further is contrary to all the facts in the case at bar. It certainly flies in the face of the conduct of the government in still considering these B.L.M. leases and grazing permits as assets of the parties for the purposes of collecting inheritance taxes by the Internal Revenue. If ever a case were presented for applying the doctrine of equitable estoppel this must be the one.

The legal argument cited under the prior proposition concerning the application of equitable estoppel is adopted in support of this proposition.

CONCLUSION

In conclusion it is submitted that the decision of the lower court must be reversed in order to protect the constitutional rights of the petitioners and in order to require the government to honor its contractual obligations.

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APPENDIX

In the United States Court of Claims

No. 95-75

Diz Livestock Co., *et al.*

v.

The United States

Frederick A. Smith, attorney of record for plaintiff.
Gerald S. Fish, with whom was *Assistant Attorney General Peter R. Taft*, for defendant.

Before DAVIS, *Judge*, Presiding, NICHOLS and KUNZIG, *Judges*.

ORDER

This contracts and Taylor Grazing Act compensation case comes before the court on defendant's motion for summary judgment and plaintiffs' motion for oral argument.

Plaintiffs, owners of New Mexico land rights, seek (1) damages in lieu of specific performance of certain "lease and suspension" agreements, or for defendant's alleged breach of the agreements, and (2) additional compensation under 43 U.S.C. § 315q (1970) (granting compensation for Government withdrawal of Taylor Grazing Act permits). Because plaintiffs cannot recover under the "lease and suspension" agreements or under the Taylor Grazing Act, we hold for defendant.

Plaintiffs' lands lie within the White Sands Missile Range in New Mexico. In World War II, part of the land (including the

site of the first atomic bomb test) was used by defendant for a bombing and gunnery range. By 1946, defendant began to convert the area into a guided missile test range. As part of this development in 1949-50 defendant *leased* part of plaintiffs' interests (private ownership and state land leases) in certain lands and *suspended* plaintiffs' federal grazing permits in what has been called "lease and suspension" agreements. The agreements called for a "year to year" Government tenancy *not to continue beyond June 30, 1970*. Section 10 of the agreements required restoration of plaintiffs' lands to their original condition upon termination of the agreements. However, defendant could make a cash payment in lieu of restoration.

By 1970, defendant discovered it had a continued need for plaintiffs' lands. Instead of renegotiating the agreements, the Government filed declarations of taking of plaintiffs' private ownership and state leasehold interests in the United States District Court for the District of New Mexico. Rather than attempting to condemn the land outright, defendant appropriated the lands "for a term of years beginning July 1, 1970, and ending June 30, 1980." In the New Mexico proceedings, plaintiffs attempted to *halt the condemnation* based on an alleged breach by defendant of the "lease and suspension" agreements. In a memorandum opinion, the district court judge granted defendant's motion to strike plaintiffs' defense of equitable estoppel:

> Any claims against the United States for breaches of the lease and suspension agreement[s], if any, cannot be raised in this [condemnation] proceeding.

Having failed to block the condemnation action based on the Government's alleged breach of the "lease and suspension" agreements and on defendant's failure to pay for elimination of grazing privileges, plaintiffs brought the instant action in an attempt to recover damages. Specifically, plaintiffs say they are entitled to compensation because defendant failed under section 10 to return the lands to them in their original condition

upon the June 30, 1970, expiration of the "lease and suspension" agreements. Plaintiffs would have us find either that the Government's conduct *breached* section 10 of the agreements, or that plaintiffs are entitled to damages in lieu of specific performance of section 10. Plaintiffs also argue that they are entitled to compensation under 43 U.S.C. § 315q, due to defendant's cancellation of Grazing Act privileges.

Defendant now enters a motion for summary judgment contending that plaintiffs cannot recover either under the "lease and suspension" agreements or for any elimination of Grazing Act privileges.[1] Plaintiffs counter that there are factual issues which must be resolved before the court can settle the contract and Grazing Act issues. Plaintiffs also submit a motion for oral argument.

Upon consideration of the parties' pleadings, motions, briefs, and exhibits, we grant defendant's motion for summary judgment and deny plaintiffs' motion for oral argument.

(1) The Contract Claims:

The crux of plaintiffs' "lease and suspension" agreement claims is that defendant was inalterably obligated under section 10 to restore plaintiffs to their lands upon termination of the agreements. Defendant did not restore plaintiffs, but instead condemned additional property rights. Plaintiffs now seek damages either for breach of section 10 or in lieu of specific performance of the same section.

It is quite apparent that defendant's failure to return plaintiffs' property constitutes a *technical breach* of section 10 of the

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[1] Defendant also argues that plaintiffs' claims are barred under the doctrine of *res judicata*. Since we hold that plaintiffs cannot recover either under the agreements or the Taylor Act, we need not reach this question.

"lease and suspension" agreements. However, there is no appropriate remedy for such a technical breach because plaintiffs have suffered no damages. *See, e.g., Micrecord Corp. v. United States*, 176 Ct.Cl. 46, 361 F.2d 1000 (1966). At the instant it was obligated to restore plaintiffs, defendant properly condemned an additional ten-year interest in plaintiffs' lands. We cannot say that plaintiffs have been harmed by the Government's failure to restore plaintiffs for the few seconds it would take to satisfy the "lease and suspension" agreement provisions. To hold otherwise would compel defendant to make a useless gesture.[2]

In short, while defendant is perhaps guilty of a technical breach of the "lease and suspension" agreements, plaintiffs have suffered no compensable loss from this breach. Therefore, plaintiffs' contract claims cannot stand.

(2) Taylor Grazing Act Claims:

Plaintiffs also claim they are entitled to additional compensation for defendant's cancellation of Taylor Act grazing privileges. On cancellation, 43 U.S.C. § 315q (originally enacted in 1942) authorizes payments "*as the head of the department . . . using the lands shall determine* to be fair and reasonable for the losses suffered." Plaintiffs seek additional compensation under this provision.

Entitlement to compensation under section 315q is a matter within the discretion of the Secretary of the Army. In such a situation the function of the court is to review the Secretary's determination. The administrative decision is entitled to

[2] If plaintiffs' concern is defendant's eventual return of the lands in good condition, such anxiety can be handled in the condemnation proceedings. The New Mexico district court currently has under advisement the issue of adequate compensation for the taking, and the Court of Claims, therefore, has nothing more to contribute at this stage of the proceedings.

finality unless plaintiff can demonstrate that the Army's conduct is "so clearly wrong as to be arbitrary." *Drucker v. United States*, 204 Ct.Cl. 514, 518, 498 F.2d 1350, 1352 (1974).

On March 30, 1973, the Department of the Army denied plaintiffs' claims for additional compensation under section 315q. The Army based its denial on the ground that a portion of the "lease and suspension" agreement payments was intended to serve as full compensation for cancellation of plaintiffs' grazing permits. Plaintiffs advance no cogent reasons which would compel us to reverse the Army's decision. From all that appears in the record, we cannot say that plaintiffs' section 315q compensation (included in the "lease and suspension" agreements) was inadequate or that plaintiffs were in any way lead to believe that they would receive additional sums for cancellation of the permits. It thus appears that the Army properly denied plaintiffs' claims for additional section 315q compensation.

In summary, plaintiffs cannot recover damages in lieu of specific performance or for a breach of the "lease and suspension" agreements. Plaintiffs have been unable to demonstrate that they have been injured by defendant's breach of its contract to restore plaintiffs to their lands. Moreover, plaintiffs cannot recover on their Taylor Grazing Act claims because they have failed to demonstrate that the Army's decision to deny 43 U.S.C. § 315q relief was an abuse of discretion.

Accordingly, for the reasons stated above, It Is Hereby Ordered that defendant's motion for summary judgment is granted, plaintiffs' motion for oral argument is denied, and the petition is dismissed.

By the Court

OSCAR H. DAVIS
Judge, Presiding

June 11, 1976

Supreme Court, U. S.
FILED
DEC 7 1976
MICHAEL RODAK, JR., CLERK

No. 76-361

In the Supreme Court of the United States

OCTOBER TERM, 1976

D.I.Z. LIVESTOCK CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

EDMUND B. CLARK,
JOHN J. ZIMMERMAN,
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Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion and order of the United States Court of Claims is unreported (Pet. App. A-1 to A-5).

JURISDICTION

The order of the United States Court of Claims was entered on June 11, 1976. The petition for a writ of certiorari was filed on September 9, 1976. The jurisdiction of this Court properly is invoked under 28 U.S.C. 1255(1).[1]

QUESTION PRESENTED

Whether the United States breached certain agreements relating to the leasing of petitioners' interests in

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[1]Petitioners allege jurisdiction under 28 U.S.C. 1257(3) (Pet. 2), but this deals only with final judgments or decrees rendered by the highest court of a state.

certain land, and, if so, whether petitioners have suffered any damages by reason of the alleged breach.

STATEMENT

After World War II the United States entered into certain "lease and suspension agreements" with petitioners and their predecessors in interest (hereinafter "petitioners"), which provided for the government's leasing of certain land in New Mexico (comprising part of the White Sands Missile Range) that the petitioners had previously used for ranching. The land in question consisted of land owned by petitioners, land leased by petitioners from the State of New Mexico, and land owned by the United States but used by petitioners pursuant to grazing permits issued under the Taylor Grazing Act, 48 Stat. 1269 *et seq.*, as amended, 43 U.S.C. 315 *et seq.*

Each lease and suspension agreement provided that, for an established annual rental, the United States obtained possession of "* * * all right or privileges [petitioners] posses[s] to the following described premises for the Government's full and unrestricted use * * * ." In each case the "premises" included private land, leased state land, and federal land on which petitioners had grazing rights. Each agreement required the government to surrender possession of the premises upon expiration or termination of the agreement. Each agreement also provided in Section 9:

> The Government recognizes that this transaction shall be without prejudice to the position of the [petitioners] in any application for grazing privileges made when and to the extent that the herein described lands are returned to federal grazing administration.

Finally, the agreements recited in Section 15:

> This agreement is made pursuant to authority of the Act of 9 July 1942, (Public No. 663, 77th Congress) as amended 28 May 1948 (43 USC 315q).

In 1952, the Secretary of the Interior withdrew all of the federal lands in question from appropriation under the public land laws and reserved them for the Department of the Army's military use. See Public Land Order 833, 17 Fed. Reg. 4822-4823. The existing federal grazing permits issued under the Taylor Grazing Act expired by their terms and, in light of Public Land Order 833, were not renewed.[2] That public land order remains in effect.

The United States continued its possession and payment of rental through the 1970 termination date specified in the lease and suspension agreements. Prior to or coincident with that termination, the United States condemned an annual leasehold, extendible at the government's option until June 30, 1980, in the land owned by petitioners or leased by them from the State of New Mexico. Declarations of taking and deposits of estimated compensation were filed on July 1, 1970, immediately following the expiration of the lease and suspension agreements.

Petitioners, as defendants in the condemnation action, challenged the authority of the United States to condemn their private and leased state land on several theories. The district court, in a memorandum opinion, rejected petitioner's contentions. The court ruled that no federal

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[2]Although the specified effective dates of grazing permits existing on May 27, 1952, does not appear from the record, all existing permits had to expire by May 26, 1962, long before termination of the lease and suspension agreements, because the maximum permitted term of such a permit is 10 years, 43 U.S.C. 315b.

grazing land was being condemned, that it was clear that all Taylor Grazing Act permits had been previously cancelled, and that the United States was not estopped from condemning petitioners' interests in the non-federal lands. The court also held that claims against the United States for breach of the lease and suspension agreements, if any, could not be raised in the condemnation action. *United States* v. *40,021.64 Acres, Dona Ana, Otero and Sierra Counties, New Mexico, et al.*, D. N. Mex., 8527 Civil, *et al.* (June 3, 1971). (Copy attached.) Petitioners did not appeal.

Petitioners brought this suit in the Court of Claims for damages for breach of the lease and suspension agreements and for compensation under 43 U.S.C. 315q (for the same amount as the damage claim) for the military use of the land covered by their federal grazing permits.[3]

The Court of Claims granted the government's motion for summary judgment. The court held that petitioners cannot recover under either the lease and suspension agreements or the Taylor Grazing Act. The court reasoned that although the United States was " * * * perhaps guilty of a technical breach of the 'lease and suspension' agreements, [petitioners] have suffered no compensable loss from this breach" (Pet. App. A-4). The court also concluded that the Department of the Army had properly determined the rental payments under the agreements were intended to include adequate Section 315q compensation and that no additional compensation should be paid under that section. The court found nothing in the record to support petitioners' alleged expectation that additional sums would be forthcoming.

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[3]Section 315q authorizes the "head of the department * * * using the lands," in his discretion, to make payments to persons whose grazing permits are cancelled, in an amount he determines "to be fair and reasonable for the losses suffered."

ARGUMENT

The Court of Claims correctly determined that petitioners have suffered no damages from the government's action with respect to the land in question. There is no conflict among the federal appellate courts and petitioners allege none. The case does not present a recurring issue of national importance.

1. The only land involved in the government's condemnation action was land either owned by petitioners outright or leased by them from the State of New Mexico. In this regard, the Court of Claims correctly held that petitioners have not been injured by the government's alleged breach of its obligation under the lease and suspension agreements to return that land to them. The obligation to return the land arose only upon termination of the agreements. At that time petitioners' contractual right to the land was transformed into a constitutional right to just compensation by the condemnation action. The award in the condemnation case thus substitutes for the private and leased state land. *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 325-326. Petitioners will be compensated fully for the value of their interests in that land.

2. Petitioners' only interest in the federal land arose from grazing permits that have long since terminated. Petitioners contend, however, that Section 10 of the lease and termination agreements, which required the government to "surrender possession of the premises upon expiration or termination of this agreement," created a contractual obligation on the government's part to restore whatever grazing rights petitioners had to the federal land at the time the agreements were executed. But the agreements merely provided (Section 9) that they were to be "without prejudice to the position of the [petitioners] in any application for grazing privileges made when [the lands] * * * are returned to federal grazing administration." The agreement did not contemplate that grazing rights would be automatically restored at the termination of each agreement, but

rather contemplated that petitioners would have to apply for new grazing rights. Therefore, the expiration of petitioners' grazing permits and the 1952 withdrawal of all of the federal lands in question from grazing usage did not abrogate any obligation in the lease and suspension agreements, which were neutral with respect to future grazing activities.

3. Petitioners also claim that they are entitled to compensation under 43 U.S.C. 315q for the termination of their grazing rights. Such compensation is not constitutionally required, *United States* v. *Fuller*, 409 U.S. 488, but is a matter within the discretion of the Secretary of the Army. The Secretary correctly determined that part of the annual rentals under the agreements were intended to and did compensate petitioners for the loss of grazing rights. As indicated above, the agreements did not preserve petitioners' grazing rights, and Section 15 of each agreement specifically relied on Section 315q, as amended in 1948, as authority for the execution of the agreement.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

EDMUND B. CLARK,
JOHN J. ZIMMERMAN,
Attorneys.

DECEMBER 1976.

DOJ-1976-12

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 8527 CIVIL
UNITED STATES OF AMERICA

v.

40,021.64 ACRES OF LAND, MORE OR LESS, SITUATE IN DONA ANA, OTERO AND SIERRA COUNTIES, NEW MEXICO, ET AL.

No. 8541 CIVIL
UNITED STATES OF AMERICA

v.

11,231.20 ACRES OF LAND, MORE OR LESS, SITUATE IN DONA ANA AND OTERO COUNTIES, STATE OF NEW MEXICO, ET AL.

No. 8550 CIVIL
UNITED STATES OF AMERICA

v.

41,098.98 ACRES OF LAND, MORE OR LESS, SITUATE IN SIERRA, SOCORRO, OTERO AND LINCOLN COUNTIES, STATE OF NEW MEXICO, ET AL.

No. 8551 CIVIL
UNITED STATES OF AMERICA

v.

9,101.24 ACRES OF LAND, MORE OR LESS, SITUATE IN SIERRA AND OTERO COUNTIES, STATE OF NEW MEXICO, ET AL.

No. 8555 CIVIL
UNITED STATES OF AMERICA

v.

46,672.96 ACRES OF LAND, MORE OR LESS, SITUATE IN DONA ANA, SIERRA, OTERO AND SOCORRO COUNTIES, NEW MEXICO, ET AL.

No. 8561 CIVIL
UNITED STATES OF AMERICA

v.

228,099.65 ACRES OF LAND, MORE OR LESS, SITUATE IN OTERO, SIERRA, LINCOLN AND SOCORRO COUNTIES, NEW MEXICO, ET AL.

No. 8577 CIVIL
UNITED STATES OF AMERICA

v.

4,910.48 ACRES OF LAND, MORE OR LESS, SITUATE IN OTERO COUNTY, STATE OF NEW MEXICO, ET AL.

MEMORANDUM OPINION

It is the opinion of the Court that the United States holds the rights in the land in question by virtue of the condemnation proceedings and not by virtue of any lease and suspension agreements. Further, it is the opinion of the Court that the motions of the United States to strike should be granted.

It appears to the Court that the real bone of contention in these cases is the interpretation and effect of the lease dated September 7, 1950. The original lease provided "that this agreement shall, in no event, extend beyond 30 June 1970". The Supplemental Agreement provides "that such agreement shall, in no event, extend beyond 30 June 1970".

Paragraph 11 of the Lease contains the following language: "Provided that in the event any Government property is located on the demised premises at the termination date, the rental will continue until such property is removed, restoration completed as provided for in Article 10 hereof, or a cash settlement and possession tendered to the Grantor."

The defendants are contending that said paragraph 11 has converted the lease into a tenancy from year to year for the reason that they contend that there are certain improvements which were on the premises when the lease expired. The Court has examined the leases very carefully and is of the opinion that the lease and suspension agreements expired according to their terms on June 30, 1970, and there was no holding over and that the government had full right to condemn the land in question. Each of the condemnation actions was filed on or before the date when the lease expired and so there was no notice of holding over nor agreement, expressed or implied, that the government was holding over. In fact, the agreements specifically provide that they shall not extend beyond June 30, 1970. Consequently, the contention of the defendants that there was holding over is not well taken. Their contention that the government was holding the property "under and by virtue of a lease and suspension agreement" is not well founded and the matters which appear on the face of the pleadings bears this out without the taking of any testimony.

The landowners rely heavily on *United States v. 534.7 Acres of Land in Orange County, Florida,* 157 F. 2d 828 (1946). The Court has read and re-read that case and it is the opinion of the Court that the case is not controlling. The Fifth Circuit had this to say:

> "The judgment of the court below denying to appellant the right to condemn may have been erroneous, but it concerned a question with respect to which the court below was vested with authority to act. The lower court's right to amend, alter, or change the judgment denying condemnation expired when the term at which the judgment was entered ended; and whether the judgment on that question was right or wrong, the court below no longer had power to change it."

It is apparent that this case does not stand for the claims contended for by the defendants. It merely held that the lower court could not change its judgment after the end of the term of court.

It does hold that the government may not be sued without its consent.

It is clear that we are not concerned here with problems of the Taylor Grazing Act. No Taylor grazing land is being condemned and it is clear that all Taylor grazing permits were previously cancelled. The United States does not have to condemn that which it already owns.

With respect to the Answer filed by the Commissioner of Public Lands, it appears that he is attempting to include certain lands and mineral rights or interests and the Court would have no jurisdiction to enlarge the proceedings. The Declaration will have to speak for itself, but it appears that the taking includes all rights. If there is any question about this, it can be cleared up at the time of the pretrial conference.

With regard to the answers filed by Mr. Hall, it appears that he is raising the bad faith of the government. It appears to the Court that the government is at liberty to condemn the land in question if it so desires and that any priority rights mentioned in the lease have expired and cannot be used at this time upon which to base a claim of bad faith.

As to the claim that there were permanent improvements on the property, the law is well settled that when real estate is taken, it includes any permanent improvements to the property. See *27 Am. Jur. 2d, Eminent Domain,* par. 291, pages 94-99.

As to the claim that there was personal property on the permises, it is clear that the same may be removed by the owner thereof. See *27 Am. Jur. 2d, Eminent Domain,* par. 293, pages 102-105.

Any claims against the United States for breaches of the lease and suspension agreement, if any, cannot be raised in this proceeding.

The motions to strike the defenses of equitable estoppel are granted.

The United States should prepare and present to the Court appropriate orders.

DATED this 3rd day of June, 1971.

UNITED STATES DISTRICT JUDGE